



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**JUDICIAL REVIEW NO. 6 OF 2011**

THE REPUBLIC.....APPLICANT

VERSUS

PERMANENT SECRETARY

MINISTRY OF SPECIAL PROGRAMMES.....RESPONDENT

SIMON MAINA GATHAMBU.....EX-PARTE APPLICANTS

**RULING**

1. The Ex-parte applicants have moved this court by way of the Notice of Motion dated 8<sup>th</sup> April, 2011 of orders that:

***(a) This Honourable Court be pleased to grant to the applicants against the respondents the order of Mandamus compelling the respondents to pay up to the applicants the amount of Kshs. 35,000 each, being the resettlement money as per the Gazette Notice No. 11 of 2008 which notice directed the respondents to re-settle the applicants; and***

***(b) The costs of this application be provided for***

2. The motion is supported by the supporting affidavit of George Njoroge Kariuki, his statement of facts and verifying affidavit and affidavit sworn in support of the application for leave on 27<sup>th</sup> January, 2011.

3. The ex-parte applicants are victims of the 2007/2008 post-election violence. They were displaced from their homes during the skirmishes and forced to relocate to Subukia where they have been living in a camp to date of the application. They have moved this court for orders of *mandamus* to compel the respondents to resettle them as mandated by the constitution in the manner stipulated in the Kenya Gazette Notice No. 8 of 2008 by which the 1<sup>st</sup> Respondent was directed to pay each internally displaced person the sum of Kshs. 35,000/= for this purpose. The ex-parte applicants further argued that the state has through the Ministry of Special Programmes already paid some of the internally displaced persons but has for unknown reasons failed to pay them as well.

4. They also argued that they continue to live under deplorable conditions and have been subjected to great suffering due to the failure of the state to honour its legal duty resettle and compensate them for the loss they incurred.

5. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by the 1<sup>st</sup> respondent on 28<sup>th</sup> June, 2011. It was contended that following the post-election violence that occurred after the 2007 general elections, the

government established the National Humanitarian Advisory Board and the Humanitarian Fund vide Gazette Notice No. 11 of 2008. The functions of the board included the determination of the persons who were adversely affected during the violence, resettle the persons displaced from their homes, replace the basic household effects that were destroyed, reconstruct basic housing and the victims restart their livelihood. To this end, the Boards policy was that payment of Kshs 10,000/= for purposes of buying household effects and Kshs. 25000/= to construct the houses be made to the heads of households. With the coordination of the Ministry of State for Provincial Administration and Internal Security a list of those affected was compiled. Only those profiled before 31<sup>st</sup> December, 2008 were eligible.

6. The ex-parte applicants were among the heads of households who were paid the Kshs. 10,000/=. However the state is no longer paying the affected persons the Kshs. 25,000 and has instead decided to build homes for those still residing in camps. It was also contended that this policy decision is not a statutory duty which the 1<sup>st</sup> Respondent can be compelled to perform. The said Gazette Notice was only a notification to the public of the government policy and did not impose a statutory duty on the 1<sup>st</sup> Respondent to compensate the ex-parte applicants.

7. The application was canvassed by way of written submissions. The ex-parte applicants' submissions were filed on 30<sup>th</sup> June, 2014. They argued that there were **two issues for determination in this case, whether the respondents breached a statutory duty and whether the ex-parte applicants have satisfied the conditions required for grant of an order of mandamus.**

8. On the first issue, the ex-parte applicants relied on the provisions of article 27 (1) which guarantees the right to equality and freedom from discrimination, article 27 (6) which require give full effect to the realization of the rights guaranteed under the article, the state shall take legislative and other measures including affirmative programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination and article 27 (7) which provides that any measure taken must adequately provide for any needs to be on the basis of genuine need.

9. It was the ex-parte applicants' submission that the above law vested a duty on the government to take affirmative action by legislating policies designed to redress any disadvantage suffered by persons as a result of past discrimination. The decision of the state to enact the Legal Notice was in fulfilment of this objective. The ex-parte applicants have a legitimate expectation under Article 47 of the Constitution that they will be resettled as per the legal notice.

10. The order of mandamus is the appropriate remedy to compel the performance of a public duty where there has been failure to perform the duty to the detriment of the affected party. They relied on the holding in **Printing Industries Limited v City Council of Nairobi J.R. No. 224 of 2012** in this regard and asked the court to grant the orders as prayed.

11. The Respondents relied on the submissions dated 29<sup>th</sup> June, 2011. They argued that the application is bad in law and incompetent because the state cannot be compelled by court to perform government policy. The respondents relied on the case of **Republic v Minister for Finance & Another ex-parte Nyong'o & 2 Other [2007] eKLR** in support of this submission. There is no statutory duty that is vested upon the 1<sup>st</sup> respondent to compensate the ex-parte applicants. Such a duty must be mandatory and not optional or discretionary. The order of mandamus will only issue when the public body has refused to act. See **Kenya National Examination Council v Republic ex-parte Geoffrey Njoroge & Other [1997] e KLR**. The refusal to perform a certain act must be shown to be unlawful. See also **Wamwere v Attorney General [2004] KLR 166**. The respondents' submission was that the application does not meet the threshold for grant of the order of *mandamus* and the same should be dismissed with costs.

### **Analysis and determination**

12. The ex-parte applicants have sought the judicial review remedy of mandamus to compel the 1<sup>st</sup> respondent to pay them the sum of Kshs. 25,000/=to facilitate their resettlement pursuant to its undertaking in Legal Notice No. 11 dated 30<sup>th</sup> January, 2008. The issue for determination in this

application emanates from the respondents' argument whether such an order can be issued by the court in the present proceedings.

13. The order of mandamus was defined by the court of appeal exhaustively in **Kenya National Examination Council V Republic, Exparte Geoffrey Gathenji & 9 Others**, (*supra*) citing an excerpt from Halsbury's Law Of England, 4<sup>th</sup> Edition Volume 1 at page 111 from paragraph 89 which provides:

*"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."*

At paragraph 90 headed "the mandate" it is stated:

*"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."*

The court then stated:

*"What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."*

14. In **Republic v The Commissioner Of Lands And Another Ex-Parte Kithinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012**, G.V. Odunga, J held and cited with approval the definition in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543**, where it was held that:

*"Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature."*

15. The learned judge went on to enumerate the instances when the order will issue as follows:

*"The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; that the court would not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will present problems like lack of adequate supervision.....It has further been held*

*that Mandamus is first, employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. Secondly, it is used to enforce the performance of public duties, by public authority, and not when it is under no duty under the law. However, it would seem that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms, and fall under the classic formula of “any body of persons having legal authority to determine questions affecting the rights of subjects” like non-statutory self-regulating bodies. Thirdly, mandamus may issue directing the concerned authority to act according to law. Fourthly, there must be a legal right, or substantial interest of the petitioner, the petitioner must satisfy the Court that he has a legal right, the performance of which must be done by the public authority. ..”*

16. In **Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah [2015] eKLR** the court emphasized that an order of mandamus will only issue to compel the performance of a statutory duty-

*“Therefore, the fulcrum of an order of mandamus is that a statutory duty must be owed to an applicant and the public officer or public body, after being asked to perform the duty, has refused or failed to discharge that duty and there is no other adequate remedy. In matters involving exercise of judgment and discretion the public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.”*

17. Further, in **Mwau v Principal Immigration Officer [1983] eKLR** the court emphasized that the duty sought to be enforced must be specific and precisely defined:

*“Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ (sic) of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in interferences by the judicial department with the management of the executive department of the government. The courts will not intervene to compel action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is preemptory”*

18. The above decisions are to the effect that in order to succeed in an application for judicial review for the order of *mandamus* the party seeking must show that the impugned body had a legal duty imposed by statute or other law to act in a certain manner but it has failed to act even after the request of the affecting person. In **Wamwere v Attorney General [2004] KLR 166** the court further held that it is not enough to show that there was refusal by a public officer to act, it must also be established that such refusal was unlawful.

19. The ex-parte applicants in this case seek orders to compel the 1<sup>st</sup> Respondent to pay them the sum of Kshs. 35,000/= for the damages they suffered during the post-election violence. This duty does not have any statutory underpinning. From the record before the court, it was largely a policy decision by the government to compensate the victims affected.

20. The purpose of judicial review is to enforce the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly. The courts powers are limited to determining the legality of the actions of the other arms of government. In **Republic v Minister for Finance & Another ex-parte Nyongo (supra)** it was held that:

*“...courts of law are not involved in policy and governance issues.... Judicial review jurisdiction recognizes the need of good public administration and is not directed at executive policy unless, it is clearly demonstrated that an Act of Parliament is being violated.”*

21. Therefore a party seeking an order of *mandamus* must show a legal duty to act, and failure by the body cited to act. The policy decision being enforced has no legislative context from which the court can decipher the precise nature of duties conferred on the body and the manner in which such duties are to be carried out, and, accordingly cannot be enforced by way of judicial review. The Kenya Gazette Notice which the ex-parte applicants cited as the law establishing the duty, was only a publication of the body that was tasked by the state to implement this directive, and the scope of its duties and powers. The same cannot be regarded as a law which conferred an obligation on the state to compensate the ex-parte applicants.

22. The applicants claim was anchored on Article 27 of the constitution which provides for the right to equality and freedom from discrimination. They argued that they are disadvantaged persons being victims of the post-election violence. The state has an obligation to take measures to address their situation. They also argued that they have been discriminated by the state which has accord them the same treatment as other victims of post-election violence who have already been compensated as per the legal notice. It was not pegged upon any specific duty that was owed to them by the state. It is therefore a claim for enforcement of the right to equality and freedom from discrimination under Article 27 of the constitution which should have been made by way of a constitutional reference. It is not amenable for enforcement through Judicial Review proceedings.

23. I am guided in this regard by the court of appeal in **Nation Media Group Limited v Cradle - The Children's Foundation Suing Through Geoffrey Maganya [2016] e KLR** where the respondent was seeking an order of mandamus compelling the appellant to comply with the provisions of *section 39* of the Persons with Disabilities Act No. 14 of 2003. The High court in that case had found that the judicial review remedy was not available against the respondent as it was not a public entity. Nonetheless, relying on its obligation to do substantive justice under **Article 159 (2) (d) of the Constitution**, the court converted itself into a constitutional court and proceeded to find against the respondent that it had violated the right of persons with hearing disabilities to equality and freedom from discrimination.

24. In reversing the above decision, the court of appeal held that jurisdiction is everything and is invoked by the procedure a party pursues. In judicial review the special jurisdiction is invoked under *Order 53* of the Civil Procedure Rules while the jurisdiction of the court to enforce fundamental rights is invoked under *Articles 23-251* of the Constitution. The applicant had invoked the jurisdiction of the High Court under *Order 53* hence it was not open for the learned Judge to convert and alter the proceedings.

25. The question of enforcement of fundamental rights was not placed before the court. The party had only sought an order of *mandamus* and therefore the court had no jurisdiction to determine. The court also relied on its earlier decision in **Emfil Limited -vs- Registrar of Titles Mombasa & 2 Others [2014] e KLR** where it held that:

***“The extract of the judgment of the High Court reproduced herein above (paragraph 13) reveals that the adoption of the constitutional reference proceedings under Article 22 and 23 by the learned judge was basically to expand the proceedings in order to include the issue of compulsory acquisition. But the appellant in the notice of motion only mentioned compulsory acquisition in passing. It was not a specific relief that was sought. Unlike the Githunguri case, it cannot be said that it was necessary to convert the applicant's Judicial Review proceedings to a constitutional reference in order to allow the court the latitude in granting relief. The issue of compulsory acquisition was not before the judge for determination, such as to justify expanding the proceedings to accommodate it. .... The appellant having specifically moved the court for orders of Judicial Review, which were available to the appellant under Order 53 of the Civil Procedure Rules, the court had no business tampering with his application by turning it into an application for enforcement of the bill of rights under the Constitution.”***

26. The ex-parte applicants' case is properly a constitutional claim for infringement of their right to equality and freedom from discrimination. They however moved this court by way of judicial review proceedings which are special in nature and sought only an order of mandamus to compel the state to pay them a specific amount. They did not show that this obligation was underpinned by any legislation.

27. For the above reasons, the application dated 8<sup>th</sup> April, 2011 is hereby dismissed with an order that each party bears its costs of the application.

**Dated signed and delivered this 9<sup>th</sup> Day of February 2017**

**J.N. MULWA**

**JUDGE**